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No. 78-1273

In the Supreme Court of the United States

OCTOBER TERM, 1978

NATIONAL JEWISH HOSPITAL AND RESEARCH CENTER, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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1. The Board found that petitioner ("the Hospital") violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), by promulgating and maintaining a rule that prohibited employee solicitation in any public area within the hospital premises (Pet. App. 33).[1] Following its decision in St. *John's Hospital and School of Nursing, Inc.*, 222 N.L.R.B. 1150 (1976), enforcement denied, 557 F. 2d 1368 (10th Cir. 1977)[2], the Board

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[1]The Board further found that the Hospital violated Section 8(a)(1) of the Act by issuing a written warning notice and oral reprimand to employee Richard Blake for soliciting in the cafeteria, contrary to the invalid rule, and Section 8(a)(3) and (1) by discharging Blake for engaging in union activities (Pet. App. 33).

[2]In *St. John's*, the Board held that, while a hospital may lawfully ban employee solicitation, even during non-working time, in immediate patient care areas such as patients' rooms, operating

concluded that the rule was overly broad since it encompassed public areas that were not devoted to patient care, such as the cafeteria, which was used by employees and patients (Pet. App. 14-15).[3] The Board rejected the Hospital's contention that, because most of its patients were ambulatory and suffered from conditions aggravated by stress and anxiety, it should be permitted, under the principles enunciated by the Board in *St. John's,* to ban employee solicitation in all areas to which patients have access. Instead, the Administrative Law Judge, whose findings were adopted by the Board, found that the Hospital's practices did not bear out its claim that, in those areas of the Hospital where patients mingle with other patients and the visiting public without prohibition, employee solicitation would interfere with patient care. "The record indicates that solicitations are permitted for United Way and United Jewish Appeal, the patients herein converse, and indeed express differences of opinion in these social settings without general restriction as to subject matter. There is no evidence that employees are restricted from discussing whatever they wish in the cafeteria, except union solicitation." (Pet. App. 16-17).[4]

2. The court of appeals (Senior District Judge Stanley dissenting) upheld the Board's decision and enforced its remedial order. The court found this Court's decision in *Beth Israel Hospital* v. *National Labor Relations Board,*

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rooms, and places where patients receive treatment, a ban on that activity in other areas to which patients and visitors have access is invalid, absent a showing by the hospital that such a ban is necessary to avoid disruption of patient care.

[3]The effect of the rule was to confine employee solicitation to the employee locker rooms and lounges (Pet. App. 18).

[4]The court also noted that the cafeteria "in the past, has been divided, whereby employees are directed to one side and patients to the other. This does allow patients to have some latitude if they do not wish to associate with employees" (Pet. App. 57).

437 U.S. 483 (1978), to be "controlling" (Pet. App. 57). The court stated (*id.* at 56-57):

> The record before us provides no factual basis for a conclusion that the patients at National Jewish Hospital suffered upset or experienced disruption of tranquility as a result of union solicitation in the cafeteria or in other places. In this connection we must be mindful that the Supreme Court in *Beth Israel* made it plain that the burden was on the employer to bring forward positive evidence showing that solicitation activities had a disrupting effect upon patients' health. In the dearth of such evidence, it becomes impossible to upset the findings of the Board and, therefore, there is no alternative except to enforce the Board's order. To accept the notion that the union solicitation per se pollutes the atmosphere would be out of harmony with the Supreme Court's ruling on burden of proof. Therefore, the view that the mere presence of patients in various places in the hospital of itself prevents union solicitation in those places must also be rejected. To so rule would not only be unsupported by evidence, it would also, due to the ambulatory condition of the patients, render the entire hospital off limits to solicitation.

3. In *Beth Israel, supra,* the Court held that a ban on employee solicitation in that hospital's cafeteria, which was used primarily by employees but also by patients and visitors, violated Section 8(a)(1) of the Act since the hospital had not sustained its burden of showing that such a ban was necessary to avoid a disruption of patient care. The basic questions presented here are whether the principles of the *Beth Israel* decision are applicable (1) to a hospital cafeteria where the patient usage is greater than it was in *Beth Israel* and (2) to other public areas of

the hospital to which patients have access.[5] The same basic questions are presented in *National Labor Relations Board* v. *Baptist Hospital, Inc.*, No. 78-223, cert. granted January 8, 1979, and it is likely that the Court's decision in that case will provide guidance as to the proper resolution of this case.[6] Accordingly, consideration of this petition should be deferred pending this Court's decision in *Baptist Hospital.*

Respectfully submitted.

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[5]Petitioner misconstrues the opinion of the court below in contending that the court would require the Hospital "to permit solicitation until it could collect enough incidents to bring forth 'positive evidence' that solicitation had actually caused injury to patients" (Pet. 9). The opinion as a whole makes plain that the court was not requiring the Hospital to show that solicitation had actually resulted in harm to patients, but merely to adduce evidence from which it could reasonably be concluded that solicitation in particular areas of the Hospital would be likely to interfere with patient care.

[6]We are sending petitioner a copy of our brief in No. 78-223.

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